No. 73-549

DEC 4 1973

MICHAEL RODAK, JR., CL

In the

Supreme Court of the United States

OCTOBER TERM, 1973

BELL SUPERVISORS PROTECTIVE ASSOCIATION
(Not a Labor Organization), Petitioner

vs.

NATIONAL LABOR RELATIONS BOARD, Et Al.

On Petition For A Writ of Certiorari To
The United States Court of Appeals For
The District of Columbia Circuit

REPLY OF BELL SUPERVISORS PROTECTIVE ASSOCIATION TO MEMORANDA OF NATIONAL LABOR RELATIONS BOARD AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS

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The Unions and the Labor Board would have the Petition denied as to the second question presented, i.e., whether the Board can rightfully refuse to pass upon a question apparent on the face of the record the General Counsel made—the legality of a union shop imposed upon an inappropriate bargaining unit.

Whether an important administrative agency may, for baseless, asserted "procedural" reasons, find it "inadvis-

able" to notice a blatant violation of law, is an important federal question as to the limits of administrative discretion.

The permission given by the District of Columbia to the Board to evade its duty is flatly contrary to the 8th Circuit's decision that the Board has a duty to decide material issues even though not specifically pleaded (*American Boiler Mfgr's Assoc.* v. *N.L.R.B.*, 404 F 2d 547, 556, 8 Cir. 1968), the 5th Circuit's view that avoidance of a hard issue is an abuse of discretion (*Connell Construction Company, Inc.* v. *Plumbers and Steamfitters Local Union No. 100*, Aug. 22, 1973, ... F 2d ....., 72 LC ¶13,911) and the 9th Circuit's views on the duty of a Trial Examiner or the Board to amend a complaint to conform to evidence voluntarily introduced without objection (*Frito Company* v. *N.L.R.B.*, 330 F 2d 458, 465, 9 Cir. 1964; *N.L.R.B.* v. *Sterling Furniture Co.*, 202 F 2d 41, 44, 9 Cir. 1953).

There are factual errors in the Memoranda for the Unions and the Board that require correction:

1. Both Memoranda inaccurately state that "The Association sought to amend the Complaint." But as the Examiner found, "***[T] Charging Party disclaimed any power on its part to amend the Complaint, but pointed out that such power resides in the Trial Examiner and in the Board ***." (Pet. 20a) There is no doubt that the Examiner and the Board have the power and duty to amend where the proofs voluntarily introduced without objection show a patent violation of the law which it is the Board's sworn duty to correct.

2. Footnote 5 of the Memorandum for the Board erroneously states that "***only one of the two parties to

the collective bargaining agreement was a party in the unfair labor practice proceedings." The Solicitor General has overlooked that Illinois Bell was given leave to enter the proceedings. It appeared by Paul J. Furlong (A. 66) who examined witnesses and participated fully. Neither he nor counsel for the General Counsel objected to Bell Supervisor's motion that the complaint be amended.

3. Both Memoranda argue that "Counsel for the General Counsel did not join or consent to the Association's Motion to Amend the Complaint." If failure to object is not *explicit*, it certainly is *implicit* consent.* Moreover, counsel for the General Counsel was the one who put in (without objection from the unions) nearly all of the evidence that justified the Motion to Amend the Complaint to Conform to the Proof.

4. Both Memoranda imply that for the Trial Examiner to have amended the complaint to allege that the union shop contract was illegal, would be to overrule the General Counsel's action of a year earlier in refusing to issue a complaint against Illinois Bell while the strike was in progress and before the supervisors had been fined. That veiled argument is stretched too far. The General Counsel's decision not to prosecute at one time does not preclude a decision to prosecute another party at a later time on established, rather than threatened, facts. The General Counsel did not object to the motion to amend. Appeal counsel cannot do it for him.

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*Note that the 9th Circuit in *Frito Co.* v. *National Labor Relations Board*, 330 F 2d 458, treated the action of the General Counsel in putting in evidence *dehors* the complaint as constructive consent that the complaint be amended.

5. Both Memoranda point out that Bell Supervisors' motion was made on the last day of the hearing. That is when a motion to conform pleadings to proof is usually made. Such a motion cannot be made before trial. More importantly, neither Memorandum even hints how any party would have been prejudiced legally had the Complaint been amended. The time for submitting briefs had not arrived and no one claimed (or yet claims), to have additional relevant evidence that would avoid the legal transgression. Thus this Court is presented with the naked question of whether an administrative tribunal has allowable discretion to evade an important question, fairly presented. The Board is supposed to enforce the law—not to duck it. It should be so told, as the 5th, 8th and 9th Circuits have tried to tell it.

6. The Memorandum for the Board hints, without taking a position, that although Bell Supervisors' Petition should be granted on question No. 1, that perhaps Bell Supervisors may not have standing to raise the question because it did not intervene in the Union's review proceeding, No. 71-1559. The Memorandum suggests that the fact that No. 71-1785 was originally consolidated with No. 71-1559 would not ordinarily be sufficient to make the Association a party in No. 71-1559, citing paragraph 42.02 of Moore's Federal Practice. There is nothing in Moore bearing upon the unique situation in which two parties seek review of the same Labor Board order, virtually simultaneously, but in different Circuits, the later filed proceeding is transferred to the Circuit first acquiring jurisdiction and the proceedings consolidated *"for all purposes."* There is no broader or more sweeping consolidation than one "for all purposes." The notion that to participate fully in a case so consolidated a party must

file a separate intervention petition is a disservice to simplified judicial procedure.*

Respectfully submitted,

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*In our Petition for Certiorari we stated (p. 2) that the consolidation order had never been vacated. We so believed erroneously. Either through error in the Clerk's office or a failure of the Postal Service the order of June 29, 1973 vacating the consolidation order never reached the undersigned. We first saw a copy of it in the Solicitor General's present Memorandum.